IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NUMBER 76-1097

In the Matter of)
)
GIBSON PRODUCTS OF ARIZONA,)
a limited partnership,)
)
Debtor.)
)
ARIZONA WHOLESALE SUPPLY)
CO.,)
)
Petitioner - Appellee,)
)
vs.)
)
GEORGE J. ITULE,)
)
Respondent - Appellant.)

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ARIZONA WHOLESALE SUPPLY CO., Petitioner - Appellee, vs. GEORGE J. ITULE, Respondent - Appellant.	)

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears at 543 F.2d 652.

QUESTION PRESENTED

1. Whether the security interest in non-identifiable proceeds recognized by Arizona Revised Statutes Section 44-3127(D) (4) (Uniform Commercial Code Section 9-306(4) (d)) is avoidable by a trustee under the provisions of the Bankruptcy Act.

STATEMENT OF THE CASE

Petitioner Arizona Wholesale Supply Co. (hereinafter "Wholesale") sold various appliances to Gibson Products of Arizona (hereinafter "Gibson") and retained a security interest in the appliances to secure the purchase price, which security interest was perfected more than four months prior to the initiation of insolvency proceedings against Gibson. Receipts from the sale of the Wholesale appliances were commingled with funds from other sources by Gibson. The United States District Court for the District of Arizona found that Wholesale had a valid security interest covering all of Gibson's cash receipts during the ten days prior to institution of insolvency proceedings. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding that the security interest recognized by the District Court constituted a voidable preference to the extent that the cash receipts in question were not traceable from the appliances in which Wholesale had a security interest.

ARGUMENT

Petitioner presents several arguments in support of the grant of certiorari in this case, but the points raised in the Petition which bear directly upon the provisions set forth in and suggeted by the Supreme Court Rule 19 are essentially two: that there is a conflict between the Circuits on a point of Federal Law, and that the issue decided by the Ninth Circuit is such a source of turmoil in the business community that this Court should put the issue at rest. Nevertheless this brief will treat each of the agruments raised in the Petition.

The conflict alleged by Wholesale arises from the reference in the opinion by the Court of Appeals herein to the case of Fitzpatrick v. Philco Finance Corp., 491 F.2d 1288 (7th Cir. 1974).

But in quoting the language in the opinion rejecting the reasoning adopted by the Seventh Circuit the Petitioner has omitted the qualifying phrase found at page 5 of the Opinion (page A-16 of Petition: "Although we reach a similar result . . . ." The phrase is important because it points out the fact that while the two Circuits applied different reasoning in the respective cases, they reached results which were essentially the same. In Fitzpatrick the Seventh Circuit decided that the phrase "any cash proceeds" found in U.C.C. § 9-306 (4)(d)(ii) net "proceeds derived from and traceable to the original collateral." The result was that the creditor could recover funds under the Code provision only to the extent that such funds could be identified as arising from the sale of his collateral. In the instant case that the phrase "any

cash proceeds" means "any cash proceeds from any source," but to the extent that such proceeds are not shown to be derived from the sale of the original collateral, the security interest therein is avoidable by the trustee under Section 60 of the Bankruptcy Act. Thus the only difference between the two cases is that the Seventh Circuit would hold that no security interest arises in non-identifiable proceeds under the particular circumstances set forth in the Code section in question, and the Ninth Circuit would hold that such an interest does arise but can be avoided by the trustee.

Before a purported conflict between the Circuits should give rise to the granting of certiorari on the point in conflict, there should be a "real and embarrassing conflict of opinion and authority" between the Courts of Appeals. N.L.R.B. v. Pittsburg S. S. Co., 340 U.S.

498, 71 S.Ct. 453, 95 L.Ed. 479 (1951). Respondent submits that the decisions of the respective Circuits in this case are essentially harmonious.

Petitioner further asserts that wealth of scholarly discussion on the question presented here supports the granting of certiorari. But unless such discussion reflects a matter of significant public concern, certiorari is not warranted, as this Court does not sit to resolve issues of scholarly debate. See Rice v. Sioux City Mem. Park Cemetary, Inc., 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Although the debate in the Law Reviews over the interpretation of U.C.C. § 9-306(4)(d) has been going on for over twenty years, there are only two opinions from the Courts on the subject - and those essentially in accord - indicating that the issue of rather less pressing than the debate would lead one

to believe.

Moreover, the preponderance of scholarly authority is conctrary to Petitioner's position herein. The majority of the writers who have treated the subject have concluded, for one reason or another, that the provisions of U.C.C. § 9-306(4)(d) are voidable, at least as to non-identifiable proceeds. E.g., 4A Collier on Bankruptcy, ¶ 70.62 A [illegible] (14th Ed. J. Moore & J. King 1976); Levy "Effect of the Uniform Commercial Code Upon Bankruptcy Law and Procedure," 60 Com. L.J. 9, 11-12 (1955); Kennedy, "The impact of the Uniform Commercial Code on Insolvency: Article 9, "67 Com. L.J., 113, 116-17 (1962); Marsh, "Triumph or Tragedy?: the Bankruptcy Act Amendments of 1966, 42 Wash. L.Rev. 681, 715-17 (1967); Marsh, "Book Review," 13 U.C.L.A. L.Rev. 898, 907-09 (1966); Comment, "The Commercial Code and the Bankruptcy Act:

Potential Conflicts," 54 N.W.U.L.R. 411, 420-24 (1958). Thus Judge Hufstedler did not ignore the authority set forth in the footnote to the opinion below; the opinion was in accord with the bulk of scholarly opinion.

Petitioner's next point, is that the U.C.C. is in substantially the same form, the law in all of the states. But as the quotation at p. 6 of Petitioner's Brief explicitly recognizes, a contrary provision of the Bankruptcy Act will be presumed to supercede the U.C.C.

Petitioner next proceeds to the contention that the opinion below was erroneous as well as inconsistent in finding the existence of a preference in this case, inasmuch as a relation back to the initial perfection of the security interest is conceded. The provision in U.C.C. § 9-306 (3) that a security interest in proceeds is "continuously

perfected" is inapposite to a security interest under subparagraph (4) (d), which refers to a security interest not in proceeds, but in "all cash and bank accounts of the debtor". And in referring to the circumstances under which a creditor's priority relates back to the initial perfection, at page 2 of the Ninth Circuit Opinion (page A-14 of Petition) the Court makes it clear that it is referring to identifiable proceeds, and not to those treated by subparagraph (4) (d) of the provision in question. The quotation from footnote 54 to Comment, 54 N.W. U.L.Rev. 411, 421-22 (1958) is similarly inapposite in that it refers to proceeds in general, and not to non-identifiable proceeds. In fact, the author of the comment reaches a conclusion favorable to the position taken by Respondent herein in that tracing of proceeds under subparagraph (4)(d) is

favored by the opinion of the Ninth Circuit. Id. at 423-24.

In re Harpeth Motors, 135 F.Supp. 863 (M.D. Tenn. 1955), relied upon by Petitioner in support of its position, was a case where a security interest arose from a demand for delivery of proceeds independent of any insolvency proceeding under § 10(b) of the Uniform Trust Receipts Act, and as such is clearly distinguishable in the case at bar. Further, the Harpeth decision has been soundly criticized as to its validity. E.g., In re Crosstown Motors, Inc., 272 F.2d 224 (7th Cir. 1959); cert. denied, 363 U.S. 811, 80 S.Ct. 1246, 4 L.Ed.2d 1152 (1960).

The quotation from Kennedy, "The Impact of the Uniform Commercial Code on Insolvency," Article 9, 67 Comm. L.J. 113 at 121 (1962) appearing at page 7 of the Petition is both taken out of con-

text and misconstrued. In the first place, the quotation is referring to identifiable proceeds, which are not at issue here. In the second place, the quotation is directed to § 67 (c) of the Bankruptcy Act, dealing with liens, and not with § 60, which is concerned with preferred creditors. Pages 116-17 of the article demonstrate that the author is squarely opposed to Petitioner's position when it comes to unidentifiable proceeds.

It is also misleading to suggest that Petitioner's position is supported by Collier on Bankruptcy:

> "There is a definite problem, however, as to the validity of a security interest in the unidentifiable proceeds under Sections 60 and 67 (c) . . . if the security interest does not arise until

> the advent of insolvency proceedings, what is to prevent it from being declared a voidable preference under § 60 . . . (Sections 67 (c) and 70 may also invalidate the transfer) . . . . In any event, the security interest in proceeds under § 9-306 (4) of the U.C.C., where they are unidentified, may very likely be invalidated by a trustee who has an arsenal of weapons at his disposal for this very purpose." Collier on Bankruptcy, supra, at 710.

Petitioner's lengthy quotation from Mr. Henson's article at pp. 7-9 of the Petition again misses the point. Mr. Henson's lament is directed at the feared invalidation of security interests in

proceeds in general; that author reaches his conclusions as to the validity of paragraph (4) of § 9-306 without any analysis of the particular problems which arise with the commingling of funds and the springing into being at the time of insolvency of a right in collateral to which no right had previously attached.

Petitioner's final argument challenges the finding of a preference by the Court below that a preference was present under the facts of the instant case in that Section 60 of the Bankruptcy Act provides that no preference exists unless a creditor is enabled thereby to obtain a greater percentage of his debt than another creditor of the same class. The essence of the argument is that secured creditors and unsecured creditors fall into different classes for the purposes of Section 60.

But it is well established that the classes referred to by Section 60 are those set forth in Section 64 of the Bankruptcy Act, namely: tax creditors, creditors for wages, creditors entitled by law to priority, and general creditors. In re Star Spring Bed Co., 257 F. 176 (D.N.J. 1919), aff'd 265 F. 133 (3d Cir. 1920); Jentzer v. Viscose Co., 13 F. Supp. 540, 544 (S.D.N.Y. 1934), modified, 82 F.2d 236 (2d Cir. 1936). For the purposes of Section 60, both secured and unsecured creditors fall into the class of general creditors. The case cited by Petitioner deals with a creditor entitled by law to priority, namely a landlord, who would fall into a different class than a general creditor. Thus it is submitted that Petitioner's position on this issue is clearly erroneous and ought not to furnish grounds for the granting of

certiorari herein.

CONCLUSION

No substantial reasons exist for the granting of certiorari in the instant case. Petitioner has been unable to point to any substantial conflict in the circuits on the issues raised, and indeed no such conflict exists. In summoning authority to challenge the validity of the opinion of the United States Court of Appeals for the Ninth Circuit, Petitioner has repeatedly relied upon authorities which do not support his position, and upon discussions relating to identifiable proceeds, than which nothing could be further from the point here. Finally, Petitioner has fallen far short of any showing that such controversy as does exist as to the interpretation of § 9-306 (4)(d) is

of sufficient importance to warrant this Court's attention. For these reasons, as more fully set forth above, Respondent respectfully urges that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit herein be denied.

RESPECTFULLY SUBMITTED,

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LAWRENCE OLLASON

Attorney for Appellant

CERTIFICATE OF SERVICE

I, LAWRENCE OLLASON, do hereby certify that on this the 1 day of ~~February~~ March, 1977, three (3) copies of the Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in final printed form, were mailed, postage prepaid, to:

MR. GEORGE F. RANDOLPH
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I further certify that all parties required to be served have been served.

LAWRENCE OLLASON

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